No. 83-196

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

WILLIAM D. RUCKELSHAUS, ADMINISTRATOR, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
Appellant,

v.

MONSANTO COMPANY,
Appellee.

On Appeal From The United States District Court For The Eastern District Of Missouri

BRIEF FOR STAUFFER CHEMICAL COMPANY AS *AMICUS CURIAE*

IN SUPPORT OF AFFIRMANCE

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BRIEF FOR STAUFFER CHEMICAL COMPANY AS *AMICUS CURIAE*

Having obtained the written consent of both parties, Stauffer Chemical Company ("Stauffer") is submitting this brief as *amicus curiae*. The brief supports the position of the appellee, Monsanto Company, regarding the constitutionality of section 3(c)(1)(D)(ii) of the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"), 7 U.S.C. § 136a(c)(1)(D)(ii) (1982).

INTEREST AND POSITION OF THE AMICUS

Stauffer has a unique and critical interest in this case. It is the only pesticide manufacturer which has initiated binding arbitration and received a compensation award under FIFRA § 3(c)(1)(D)(ii)—one of the two statutory

provisions under review. The *Stauffer* arbitration was conducted in the Spring of 1983,[1] and an award was rendered on June 29, 1983.[2] In July 1983, PPG Industries, Inc. ("PPG"), the respondent in the arbitration, contested the award by filing an action in the United States District Court for the District of Columbia. *PPG Industries, Inc.* v. *Stauffer Chemical Co.*, No. 83-1941 (D.D.C. filed July 7, 1983).[3] Now, PPG has submitted an *amicus*

[1] In re Stauffer Chemical Co. v. PPG Industries, Inc., Dkt. No. 16 199 077 82 FIFRA (Amer. Arb. Assoc. June 29, 1983).

[2] The arbitration award represents compensation from PPG for using Stauffer's research data to obtain commercially valuable "me-too" pesticide registrations. Section 3(c)(1)(D)(ii) of FIFRA authorizes EPA to grant such me-too registrations on the basis of another company's data, but only if the me-too registrant first offers and agrees to compensate the original data submitter for use of the data. The statute provides that the amount of compensation is to be determined by the parties themselves, and if they cannot agree, through binding arbitration before private arbitrators under the auspices of the Federal Mediation and Conciliation Service ("FMCS").

PPG and Stauffer failed to agree on the amount of compensation due. Accordingly, on April 20, 1982, Stauffer initiated binding arbitration. *See* 29 C.F.R. pt. 1440 (1983). A panel of three arbitrators was appointed. The ensuing hearing (in which PPG advocated an award of token compensation) extended over a three-month period, included testimony from approximately twenty-five witnesses, generated a transcript of 2700 pages, and produced a voluminous documentary record. In a twenty-four page decision, the arbitrators awarded Stauffer an initial lump sum payment of $1,465,000, plus quarterly running compensation payments based on PPG's "me-too" pesticide sales over the next ten years.

[3] Under the terms of the award, PPG was to have paid the initial lump sum to Stauffer by July 28, 1983. Instead, PPG filed its action seeking to vacate the award. Upon PPG's motion, the district court has ordered the arbitration award to be held in abeyance pending disposition of the action. The Government has moved to hold the action itself in abeyance, but PPG opposes that motion and has moved for summary judgment.

brief for the purpose of interjecting into this appeal the same arguments against the award which it has raised, and which still are pending, in its district court action. Through its *amicus* brief, PPG seeks to undermine Stauffer's award by preempting the district court and short-circuiting the judicial process. Stauffer has a compelling need, therefore, to alert the Court to PPG's objectives.

In its district court action, PPG is attacking the arbitration award by alleging that the panel of three arbitrators is guilty of "misconduct" because they supposedly applied the wrong standard for compensation. PPG argues that FIFRA § 3(c)(1)(D)(ii) limits compensation to a share of certain narrow out-of-pocket testing costs. This is the *very same argument* to which PPG has devoted virtually its entire *amicus* brief.

Stauffer submits that the question of whether FIFRA provides a standard for compensation is not presented by this case, or is at most a peripheral issue which the Court should not address. The issue of whether there is a standard will be presented squarely in *Union Carbide Agricultural Products Co.* v. *Ruckelshaus*, 571 F. Supp. 117 (S.D.N.Y. 1983), *appeal noticed* Dec. 21, 1983. Furthermore, PPG has raised in its own district court action the contention that Congress intended "cost-sharing" to be the standard. Should the Court nevertheless choose to address the question here, Stauffer's position is that the statute does not provide a standard for compensation.

SUMMARY OF ARGUMENT

The question presented in this case is whether FIFRA's use of data provision, § 3(c)(1)(D)(ii), effects an unconstitutional taking of property. Both the Government and Monsanto agree that if there is a taking, the statute fails to provide, and was not intended to provide,

just compensation. As a result, the Court need not reach and should not consider the question of whether Congress provided a standard in FIFRA which affords just compensation.

PPG has filed an *amicus* brief for the purpose of interjecting the compensation standard question into this case. PPG's fundamental objective is to avoid paying compensation to Stauffer under the award rendered in the only FIFRA arbitration completed to date. PPG hopes to undermine that award by prompting the Court to acknowledge a narrow "cost-sharing" standard, which would in effect overrule the arbitrators and limit Stauffer's compensation to a nominal amount.

The Court should not address in any manner the question of a standard for compensation. Not only is the issue absent from or peripheral to this case, *any* comment by the Court could preempt the district court and hamstring the parties in the action filed by PPG to challenge the *Stauffer* award. Furthermore, the issue of whether FIFRA provides a standard for compensation will be presented squarely in *Union Carbide Agricultural Products Co.* v. *Ruckelshaus*, 571 F. Supp. 117 (S.D.N.Y. 1983), *appeal noticed* Dec. 21, 1983.[4]

If the Court nevertheless should choose to consider the question, Stauffer's position is that there *is no* standard for compensation in FIFRA. Neither the statutory language nor the legislative history specifies a method for private arbitrators to follow in making an award. Furthermore, congressional statements contradict PPG's contention that Congress intended compensation to be limited to a share of certain out-of-pocket testing costs. Indeed, mandatory licensing schemes such as FIFRA

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[4] Stauffer is one of the plaintiffs in the *Union Carbide* case.

§ 3(c)(1)(D)(ii) commonly base compensation on value received, rather than on cost-sharing. Moreover, even under a cost-sharing approach, there are substantial research costs which PPG's standard fails to take into account.

ARGUMENT

I. THE COURT SHOULD NOT CONSIDER WHETHER FIFRA PROVIDES A STANDARD FOR COMPENSATION

A. The Question Of Whether FIFRA Provides A Standard Is Not Presented, Or Is At Most A Peripheral Issue

Both parties in this case agree that the issue before the Court is whether FIFRA § 3(c)(1)(D)(ii) effects an unconstitutional taking of property. If there is a taking, there is no dispute as to whether the FIFRA arbitration procedure provides "just compensation." The Government admits that it does not. *See* Appellant's Jurisdictional Statement at 25 ("the intra-industry compensation scheme was not meant to provide Monsanto 'just compensation' within the meaning of the Fifth Amendment. . . ."); Appellant's Brief at 41 ("the statute provides some measure of compensation under the data consideration provisions . . . the Tucker Act . . . provides Monsanto the means to obtain whatever additional just compensation is due for any 'taking.' "). Neither the Government nor Monsanto contends that FIFRA provides, or was intended to provide, just compensation. As a result, the Court has no reason to decide whether there is a standard in FIFRA providing just compensation, much less what the standard is if there is one.

Even if the parties disagreed about the lack of just compensation, the issue would be peripheral to this case. The district court in *Monsanto Co.* v. *Acting Administrator*, EPA, 564 F. Supp. 552 (E.D. Mo.), *prob. juris.*

noted, 104 S. Ct. 230 (1983), gave the question only cursory treatment as an off-shoot of its taking analysis. *Id.* at 566-67. Furthermore, the court found that FIFRA fails to provide just compensation not only because the statute is vague, but also because there is no provision for judicial review of arbitration awards. *Id.* Thus, the question of whether FIFRA provides a standard for compensation was ancillary to the district court's analysis.

B. Jurisprudence Dictates That The Court Not Consider The Question Of A FIFRA Compensation Standard

As explained above, the issue of whether FIFRA provides a standard for compensation is absent from, or at most, peripheral to this case. Sound jurisprudence dictates, therefore, that the Court not rule on the question:

> This Court, as is the case with all federal courts, "has no jurisdiction to pronounce any statute, either of a State or of the United States, void, because irreconcilable with the Constitution, *except as it is called upon to adjudge the legal rights of litigants in actual controversies*. In the exercise of that jurisdiction, it *is bound by two rules, to which it has rigidly adhered, one, never to anticipate a question of constitutional law in advance of the necessity of deciding it; the other never to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied*." Liverpool, New York & Philadelphia S.S. Co. v. Commissioners of Emigration, 113 U.S. 33, 39, 5 S. Ct. 352, 355, 28 L. Ed. 899.

United States v. *Raines*, 362 U.S. 17, 21-22 (1960) (emphasis added). *See also Golden* v. *Zwickler*, 394 U.S. 103, 110 (1969) ("The constitutional question . . . must be presented in the context of a specific live grievance."); *South Carolina* v. *Katzenbach*, 383 U.S. 301, 316-17 (1966) ("At

the outset, we emphasize that only some of the many portions of the Act are properly before us. . . . Judicial review of these [other] sections must await subsequent litigation.").

The question of whether Congress intended to provide a standard for compensation will be presented to the Court in *Union Carbide Agricultural Products Co.* v. *Ruckelshaus*, 571 F. Supp. 117 (S.D.N.Y. 1983), *appeal noticed* Dec. 21, 1983. The same question also is pending in PPG's district court action challenging the *Stauffer* arbitration award.[5] This question is a point of vigorous contention. *Any* comment by the Court, no matter how incidental, would preempt the district court and hamstring the parties currently litigating the issue. Furthermore, inasmuch as the issue already is on its way up to the Court in *Union Carbide*, the Court should await a full record and thorough briefing from the parties involved before addressing the question.

C. PPG Is Attempting To Interject A Compensation Standard Issue Into This Case

In its *amicus* brief, PPG concedes "that the question of the constitutionality of the arbitration provision is *not ripe for review in this case*, and therefore *should not be decided by the Court.*" PPG Amicus Brief at 2 (emphasis added). Yet, PPG's brief is devoted to the contention that the statute is constitutional only if a narrow "cost-sharing" standard for compensation is read into it.

Not coincidentally, this is *exactly* the same argument that PPG is propounding in its district court action challenging the *Stauffer* arbitration award. *See PPG Indus-*

[5] The question of whether Congress provided a standard is inherent in PPG's contention that cost-sharing *is* the standard, and also is raised by Stauffer's counterclaim for declaratory judgment.

tries, Inc. v. *Stauffer Chemical Co.*, No. 83-1941 (D.D.C. filed July 7, 1983).[6] Thus, as an *amicus curiae*, PPG is attempting to bootstrap its district court argument up to the Supreme Court, and thereby preempt the district court.

II. FIFRA DOES NOT ESTABLISH A STANDARD FOR COMPENSATION

A. The Statute And Its Legislative History

Compensation under FIFRA is controlled by § 3(c)(1)(D)(ii), as enacted by the Federal Pesticide Act of 1978, Pub. L. No. 95-396, 92 Stat. 819. *See* 7 U.S.C. § 136a(c)(1)(D)(ii) (1982). It is noteworthy that PPG in its *amicus* brief has started its argument with legislative history and not with the statute.

Section 3(c)(1)(D)(ii) does *not* specify a method for determining compensation. The statute states only that the original data submitter has "the right to compensation for the [me-too registrant's] use of the data." Under the statute, a me-too applicant must make "an offer to compensate the original data submitter." Further, "[t]he terms and amount of compensation may be fixed by agreement between the original data submitter and the applicant, or, failing such agreement, binding arbitration. . . ." The arbitrators are given complete discretion by the statute to award compensation as they deem appropriate under the facts and circumstances of each case.

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[6] Although PPG's Complaint alleges that FIFRA § 3(c)(1)(D)(ii) is unconstitutional, PPG has filed a Motion for Summary Judgment which presents the same argument set forth in its *amicus* brief. According to PPG, the only way the statute can be upheld is to dovetail onto it a provision for judicial review of arbitration awards, and to construe the statute as specifying a narrow cost-sharing standard for compensation.

To underscore the arbitrators' discretion, § 3(c)(1)(D)(ii) states that their determination "shall be final and conclusive, and no official or court . . . shall have power or jurisdiction to review any such findings and determination, except for fraud, misrepresentation, or other misconduct." 7 U.S.C. § 136a(c)(1)(D)(ii) (1982).

It is significant that the current version of FIFRA, which reflects major congressional changes enacted in 1978, is even *more* obtuse on compensation than was its immediate predecessor, the 1975 FIFRA. The 1975 (and 1972) versions of FIFRA § 3(c)(1)(D) provided that the me-too applicant must have "offered to pay reasonable compensation for producing the test data to be relied upon." Pub. L. No. 94-140, 89 Stat. 751, 755 (1975); Pub. L. No. 92-516, 86 Stat. 973, 980 (1972). Congress added even more flexibility to the statute with the 1978 provision, which pointedly omits the word "reasonable" and the phrase "for producing the test data to be relied upon." Instead, the 1978 statute merely provides "compensation for the use of the data."[7]

During the congressional hearings which preceded enactment of the 1978 amendments to FIFRA, EPA Administrator Douglas Costle acknowledged that the

[7] Additionally, other parts of the statute corroborate the conclusion that FIFRA § 3(c)(1)(D)(ii) does *not* establish a standard for compensation, much less a cost-sharing standard. Cost-sharing is expressly mentioned in § 3(c)(2)(B) of FIFRA as an *optional* procedure for registrants who *voluntarily* agree to jointly develop additional data requested by EPA on a *prospective* basis. *See* § 3(c)(2)(B)(iii), 7 U.S.C. § 136a(c)(2)(B)(iii) (1982). Section 3(c)(1)(D)(ii) provides for *mandatory* licensing of data *previously* generated by others. The fact that cost-sharing was expressly referenced in § 3(c)(2)(B), but *not* in § 3(c)(1)(D)(ii), supports the conclusion that Congress did not intend cost-sharing to be the standard for compensation under § 3(c)(1)(D)(ii).

statute provides no standard for compensation. He recommended that Congress establish "a uniform but equitable compensation formula" and "make more explicit what factors it [Congress] feels are pertinent in determining reasonable compensation." H.R. Rep. No. 343 (Part I), 95th Cong., 1st Sess. 8 (1977), *reprinted in* 1978 U.S. Code Cong. & Ad. News 1966, 1974.

Congress rejected the EPA Administrator's recommendation and declined to establish a statutory standard for compensation. Instead, Congress adopted the 1978 provision which transferred responsibility for determining compensation from EPA to private arbitrators.

The fact that Congress vested *private arbitrators* with the responsibility for determining compensation under § 3(c)(1)(D)(ii) is strong evidence that Congress intended not to provide a statutory standard. It is well-settled that arbitrators are expected to "fashion the law to fit the facts before them." *Marcy Lee Manufacturing Co.* v. *Cortley Fabrics Co.*, 354 F.2d 42, 43 (2d Cir. 1965). Arbitrators are "expected to decide matters in dispute according to those principles of equity and good conscience which, in their opinion, will do justice between the parties." *Park Construction Co.* v. *Independent School District No. 32*, 11 N.W.2d 649, 652 (Minn. 1943). Arbitrators' decisions are not restrained by a "strait jacket of precedent," and must be made on a case-by-case basis. *Singer* v. *Flying Tiger Line Inc.*, 652 F.2d 1349, 1356 (9th Cir. 1981) (citing *Diamond* v. *Terminal Railway Alabama State Docks*, 421 F.2d 228, 234 (5th Cir. 1970). *See also Wilko* v. *Swan*, 346 U.S. 427, 436 (1953); *Riverboat Casino, Inc.* v. *Local Joint Executive Board*, 578 F.2d 250, 251 (9th Cir. 1978) ("strict adherence to *stare decisis* would impair the flexibility of the arbitral process"); *Fukaya Trading Co.* v. *Eastern Marine Corp.*, 322 F. Supp. 278, 283 (E.D. La.

1971) ("arbitrators may base their decision on principles of justice and equity"); *Everett* v. *Brown*, 120 Misc. 349, 351, 198 N.Y.S. 462 (Sup. Ct. 1923) ("[t]o require an arbitrator to follow the fixed rules of law . . . would operate to defeat the object of the proceeding. . . . [The arbitrators] are free to adopt such a course as they deem best adapted to bring about a just decision in the matters in controversy"); *University of Alaska* v. *Modern Construction, Inc.*, 522 P.2d 1132, 1140 (Alaska 1974); *Associated Teachers of Huntington, Inc.* v. *Board of Education*, 33 N.Y.2d 229, 235, 306 N.E.2d 791 (1973) (arbitrator's "duty is to reach a just result regardless of the technicalities"); 5 Am. Jur. 2d *Arbitration and Award* § 140; 6 C.J.S. *Arbitration* § 60.

Further evidence of the lack of a statutory standard for compensation was provided by the Federal Mediation and Conciliation Service ("FMCS"), which FIFRA vests with the responsibility for administering data compensation arbitrations. In promulgating rules of procedure, FMCS determined that the statute does not establish a substantive standard for awarding compensation. FMCS stated:

> *FMCS does not propose to promulgate substantive standards for the arbitration of FIFRA disputes.* Indeed, review of the statute, legislative history and background of the data compensation problem illustrates the difficulty of establishing a comprehensive set of substantive standards. *The statutory scheme of FIFRA provides that the arbitrators will determine the standards on a case-by-case basis*, and prior decisions may be used for guidance in further disputes.

45 Fed. Reg. 28,105, 28,107 (1980) (emphasis added). *See* 29 C.F.R. pt. 1440 (1983).

B. The Legislative History Cited By PPG Is To Statutes Which Either No Longer Exist Or Never Were Enacted

In its *amicus* brief, PPG has exhaustively reviewed selected portions of FIFRA's legislative history. *See* PPG Amicus Brief at 6-11. It is crucially significant to note, however, that, with a single exception, *all* of the excerpts cited by PPG relate to *pre-1978* versions of FIFRA, which are not at issue here. In the Federal Pesticide Act of 1978, Congress recast the use of data and data compensation provisions of FIFRA.[8] Thus, the pre-1978 legislative history discussed by PPG is largely irrelevant.[9]

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[8] The 1978 changes to the compensation provision were part of a major overhaul of FIFRA's registration provisions. Among the other major changes incorporated by the Federal Pesticide Act of 1978 were a new provision granting ten years of exclusive use in research data for post-1978 chemicals (§ 3(c)(1)(D)(i)); a new compensation clause providing fifteen years of compensation for both pre- and post-1978 chemicals, with disputes resolved through arbitration (§ 3(c)(1)(D)(ii)); a clause providing applicants with two optional methods of supporting their registrations: either by supplying their own test data or alternatively by citing data that had been previously submitted or that appeared in the public literature (§ 3(c)(1)(D) Preamble); an exemption of formulator-type businesses from some compensation requirements (§ 3(c)(2)(D)); a provision making trade secret research data available for mandatory licensing to imitators (§ 3(c)(1)(D)(ii)); an authorization for EPA to request additional research data from registrants after registration, with registrants having the option of developing the new studies either alone or jointly (§ 3(c)(2)(B)); and authorization for EPA to grant conditional registration of pesticides, in addition to full registration (§ 3(c)(7)).

[9] There are additional defects with PPG's references to the 1972 and 1975 legislative histories of FIFRA. For example, PPG has quoted an excerpt from the legislative history of the 1975 FIFRA that purports to favor cost-sharing as the basis for compensation. H.R. Rep. No. 497, 94th Cong., 1st Sess. 65 (1975). This statement is *not* the report of the committee and reflects nothing more than the individual opinions of the three members who expressed their dissenting or additional views.

PPG's sole reference to the legislative history of the 1978 FIFRA is to a version of the bill which never was enacted. S. Rep. No. 334, 95th Cong., 1st Sess. 4, 31 (1977). Although this report of the Senate Committee on Agriculture, Nutrition, and Forestry does mention cost-sharing, the bill reported by that committee was changed substantially in conference. This report is irrelevant because it does not illuminate the statute which was enacted. No cost-sharing requirement or any other standard for compensation was adopted by Congress or included in the statute.

C. PPG's Citations To Cost-Sharing Are Contradicted By Other Statements In FIFRA's Legislative History

The legislative history of FIFRA's data compensation provision contains numerous contradictory statements. In its *amicus* brief, PPG cites several references to "cost-sharing," but omits the many congressional statements which are inconsistent with PPG's narrow cost-sharing standard.

PPG's standard is limited to a discrete group of out-of-pocket testing costs. This narrow cost-sharing formula does not take into account the tremendous value received by a me-too registrant who saves substantial time and money by relying upon another company's data. Nor does it take into account the level of innovation and effort that a company has put into a pesticide's development, or the need to provide incentives for pesticide research and development. The 1977 and 1982 reports of the House and Senate Agriculture Committees, however, indicate that these and similar factors *are* pertinent to compensation, and that compensation should be substantial, not the nominal amount which results from PPG's self-serving standard. These congressional committees stated that compensation should:

(i) *Encourage pesticide research and development.* H.R. Rep. No. 663, 95th Cong., 1st Sess. 17 (1977), *reprinted in* 1978 U.S. Code Cong. & Ad. News 1966, 1990 ("encourage greater research for safe and effective pesticides"); *id.* at 18 ("assure the continued research and development of new pesticides"); S. Rep. No. 551, 97th Cong., 2d Sess. 9 (1982) ("provide effective economic incentives for companies to engage in expensive and risk-laden research programs to develop pesticides").

(ii) *Protect proprietary rights in data.* S. Rep. No. 551, *supra*, at 9 ("protect the proprietary rights of registrants in research data"). *See also* H.R. Rep. No. 663, *supra*, at 18.

(iii) *Provide for recovery of research investments.* H.R. Rep. No. 566, 97th Cong., 2d Sess. 77 (1982) (to enable the registrant "to protect and recover its investment"); S. Rep. No. 551, *supra*, at 13 ("providing an adequate return to data developers for the value of their research").

(iv) *Reward innovative research.* S. Rep. No. 551, *supra*, at 9-10 ("rewarding innovative research efforts").

(v) *Make compensation more meaningful and equitable.* S. Rep. No. 551, *supra*, at 9 ("make compensation more meaningful and equitable than under prior law").

PPG's constricted cost-sharing standard accomplishes none of the above. Taken as a whole, therefore, FIFRA's legislative history does not make a case for cost-sharing.[10]

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[10] PPG also relies upon the decision of an EPA administrative law judge under the pre-1978 version of the statute. Ciba-Geigy Corp. v. Farmland Industries, Inc., FIFRA Comp. Dkt. Nos. 33, 34 & 41 (Aug. 19, 1980) (*see* PPG Amicus Brief at 12-13). The EPA judge based compensation on cost-sharing. This was the only compensation

D. PPG's Cost-Sharing Standard Is Inconsistent With Other Mandatory Licensing Schemes

PPG's cost-sharing standard is inconsistent with the fact that FIFRA § 3(c)(1)(D)(ii) is a mandatory licensing provision. The compensation formula advocated by PPG is based on the innovator's out-of-pocket testing costs, not on the true value received by a me-too registrant who uses the innovator's research data to obtain me-too registrations. Yet, Congress and the courts have based compensation in other mandatory licensing schemes on the value of the rights received by the licensee.

The fact that § 3(c)(1)(D)(ii) is a form of mandatory licensing cannot reasonably be disputed.[11] FIFRA authorizes a pesticide applicant to use data "without the permission of the original data submitter." Section 3(c)(1)(D)(ii). Congress has acknowledged that the FIFRA use of data provision represents "mandatory licensing of test data." H.R. Conf. Rep. No. 1540, 92d Cong., 2d Sess. 31 (1972), *reprinted in* 1972 U.S. Code Cong. & Ad. News 3993, 4130. Likewise, the Federal Mediation and Conciliation Service has described the use of data provision as a "mandatory data licensing scheme." 45 Fed. Reg. 55,395 (1980).

None of the other federal statutes which establish mandatory licensing bases compensation on costs in-

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case to have been decided when, in 1982, the Senate conducted oversight hearings on FIFRA's compensation provisions. The Senate Agriculture Committee's oversight report, in what had to have been a reference to the *Ciba-Geigy* case, stated that "data compensation has not been effective thus far." S. Rep. No. 551, *supra*, at 9. Thus, at least by implication, the members of the oversight committee, many of whom drafted the 1978 version of the statute, expressed dissatisfaction with cost-sharing.

[11] Indeed, PPG does not dispute this fact.

curred by the involuntary licensor. Instead, compensation is based on the value of the rights received by the licensee. For example, several federal statutes impose mandatory licensing of property interests in return for payment of a "reasonable royalty" to the licensor. The Atomic Energy Act, 42 U.S.C. § 2183 (1976), authorizes the mandatory licensing of patents relating to atomic energy; the Plant Variety Protection Act, 7 U.S.C. § 2404 (1982), authorizes the mandatory licensing of federally protected plant varieties; and the Trading With The Enemy Act, 50 U.S.C. app. § 10 (1976), authorizes the mandatory licensing of certain intellectual property rights during time of war.[12] In each case, the involuntary licensor is required to be compensated with a reasonable royalty for the use of the licensed property interests.[13]

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[12] The Clean Air Act, 42 U.S.C. § 7608 (Supp. V 1981), establishes a similar scheme for the mandatory licensing of certain pollution control patents "on such reasonable terms and conditions as the court . . . may determine."

[13] A reasonable royalty requires payment based on the value of the right that is licensed. Vitro Corp. of America v. Hall Chemical Co., 292 F.2d 678, 683 (6th Cir. 1961); Enterprise Mfg. Co. v. Shakespeare Co., 141 F.2d 916, 920 (6th Cir. 1944). Stated another way:

> [A] reasonable royalty is simply that amount which the trier of facts estimates a person desiring to use a patent right would be willing to pay for its use and a patent owner desiring to license the patent would be willing to accept.

University Computing Co. v. Lykes-Youngstown Corp., 504 F.2d 518, 537 n.31 (5th Cir. 1974). *See also* 35 U.S.C. § 284 (1976) (patent infringement compensated by reasonable royalty for hypothetical patent license); United States v. 564.54 Acres of Land, 441 U.S. 506, 511 (1979) (compensation to be paid in eminent domain cases is to be commensurate with fair market value of right taken measured by "what a willing buyer would pay in cash to a willing seller"); United States v. National Lead Co., 332 U.S. 319, 349 (1947) (remedy for antitrust violation arising from patent misuse is involuntary license in return for reasonable royalty based upon value of rights licensed).

Thus, these other mandatory licensing schemes do not base compensation on cost-sharing. It is highly unlikely, therefore, that Congress, without explanation, would have made an exception for FIFRA and provided a cost-sharing standard for compensation.

E. PPG's Version Of Cost-Sharing Does Not Reflect The True Costs Incurred By Pesticide Innovators

In its *amicus* brief, PPG argues that Congress intended to limit FIFRA compensation to a portion of the direct costs of producing test data necessary for registration. *See* PPG Amicus Brief at 7. Although PPG does not elaborate on what specific costs it believes are compensable, PPG's view apparently is the same narrow one that it advocated during the arbitration.

Even if Congress had intended cost-sharing to be the standard, it is unreasonable to assume that it would have limited compensable costs in the manner suggested by PPG. PPG's miserly approach to cost-sharing is to exclude all but a handful of the true costs incurred by innovators in registering a pesticide for the first time.

Pesticide innovators like Stauffer spend millions of dollars in conducting the studies and generating the many types of safety and efficacy data required for registration. These are among the regulatory research costs which innovators bear alone. Me-too registrants like PPG avoid such costs by relying upon another company's data.

Furthermore, pesticide innovators normally need five years or longer to generate government-required registration data and to undergo regulatory review before obtaining the initial registration for a new product. Because FIFRA makes it unlawful to sell a pesticide which is not registered, five or more years of sales and

profits are lost while the required data are being developed and approved. These very substantial lost profits from regulatory delays also are costs of performing government-required research. They are as real and recognizable as toxicologists' salaries and laboratory rents. Me-too registrants avoid these costs by entering the market quickly through use of another company's data.

PPG's "cost-sharing" standard excludes most out-of-pocket regulatory research costs and all costs due to regulatory delays. The result is token compensation which makes no economic sense. Congress clearly would not have intended to provide for cost-sharing by excluding the bulk of costs actually incurred by the innovator in producing the data necessary for registration.

CONCLUSION

For the foregoing reasons, the Court should not consider the question of whether FIFRA establishes a standard for compensation. Should the Court choose to address this issue, the Court should find that Congress did not provide a standard.

Respectfully submitted,

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